

EUCO INTERNATIONAL SDN. BHD. v. P.F. CHEN[F.C. (Salleh Abas L.P., Wan Suleiman & Seah F. JJ.)
July 9, 1984][Kuala Lumpur – Federal Court Civil Appeal No. 181
of 1982]*Practice and Procedure – Application for leave to appeal to Yang di-Pertuan Agong – Appeal substantially or in essence involving facts – Leave refused.*

In this case the appellants applied for conditional leave to appeal to the Yang di-Pertuan Agong from the decision of the Federal Court which ruled that the appellants were bound to indemnify the respondent who was an employee of the appellant's subsidiary for a guarantee which he gave to the Malayan Banking for providing overdraft facilities to the appellant's subsidiary – see [1984] 2 M.L.J. 61.

Held: the intended appeal was one which substantially or in essence involved factual grounds and therefore the application must be dismissed.

FEDERAL COURT.*G.S. Nijar* for the appellants/applicants.*Raja Abdul Aziz Addruse* for the respondent.

Salleh Abas L.P. (delivering the Judgment of the Court) : This is an application by the appellants for a conditional leave to appeal to His Majesty the Yang di-Pertuan Agong from the decision of this Court delivered on April 13, 1984.

Both the High Court and this Court have ruled that the appellants were bound to indemnify the respondent, who was an employee of the appellants' subsidiary, for a guarantee which he gave to the Malayan Banking for providing overdraft facilities to the appellants' subsidiary. The decision of both courts is based on the facts of oral assurance and documentary evidence showing that the appellants (the parent company) had in fact agreed to indemnify the respondent. In our view the intended appeal is one which substantially or in essence involves factual grounds. Hence we dismissed the application with costs.

Application dismissed.

Solicitors : *Abdul Aziz Ong & Co.*; *Rithauddeen & Aziz.*

A

POH SWEE SIANG v. TRUSTEES OF TONG KHOO KONGSI & ORS.[F.C. (Salleh Abas L.P., Wan Suleiman & Seah F. JJ.)
July 17 & 18, August 1984][Kuala Lumpur – Federal Court Civil Appeal No. 139
of 1984]*Practice and Procedure – Interlocutory injunction – Discharged for alleged non-disclosure of facts – Appeal – Function of appellate court – Misapprehension of facts by judge – Interlocutory injunction restored.*

B

C

In this case the appellant had brought an action against the respondents asking for an injunction to restrain the respondents from entering on his land and for damages for trespass. The appellant, by way of *ex parte* summons, obtained an interlocutory injunction to restrain the respondents as prayed in the claim. Subsequently the respondents applied to set aside the order and the Judge of the High Court discharged the interlocutory injunction on the ground that there had been failure to disclose material facts. The appellant appealed.

D

Held: on review of the facts the Federal Court was satisfied that the learned judge had misapprehended the facts which led him to a conclusion contrary to the affidavit evidence lodged by the appellant in support of his application for the *ex parte* interlocutory injunction. The interlocutory injunction must therefore be restored.

E

Cases referred to:

- (1) *Cheng Hay Gun & Ors. v. Perumahan Farlim (Penang) Sdn. Bhd.* [1983] 1 M.L.J. 248.
- (2) *Hadmor Productions v. Hamilton* [1983] 1 A.C. 191, 220; [1982] 1 All E.R. 1042, 1046.
- (3) *Lian Keow Sdn. Bhd. v. Overseas Credit Finance Bhd.* [1982] 2 M.L.J. 162.

F

FEDERAL COURT.

G

Gurdial Singh Nijar (Mohideen Abdul Kader and Miss R. Meenakshi with him) for the appellant.*C. Abraham (J.A. Yeoh with him)* for the respondents.*Cur. Adv. Vult.*

H

Seah F.J. (delivering the Judgment of the Court): On July 18, 1984 after hearing arguments of learned counsel for both the appellant and the respondents we allowed the appeal with costs. We indicated that we would give our reasons at a later date which we do now.

I

On January 10, 1984 the appellant/plaintiff, Poh Swee Siang took out a writ in the High Court at Penang against the 1st respondent/defendant, Trustees of Leong San Tong Khoo Kongsi (Penang) Registered, the 2nd respondent/defendant, Peru-

mahan Farlim (Penang) Sdn. Bhd. and 3rd respondent/defendant, Sriwata Sdn. Bhd. *vide* Civil Suit No. 17 of 1984 and claimed the following reliefs. *viz*:

- (1) An injunction to restrain the defendants whether by themselves their servants or agents or otherwise from entering the plot of land in the possession of the plaintiff having an area of approximately six acres and forming part of Holding No. 2532, Mukim 13, North East District, Penang and/or committing any nuisance trespass or interference against the plaintiff and his property on the said plot/or otherwise molesting the plaintiff his servants agents or any other person transacting or seeking to transact business with the plaintiff and/or from doing any act calculated to interfere or damage the plaintiff in his use of the said plot;
- (2) damages for trespass; and
- (3) further or other relief.

Based on a certificate of urgency the appellant, by way of an *ex parte* summons, applied for and obtained an interlocutory injunction substantially in terms of prayer 1 against all the three respondents on January 11, 1984 before Edgar Joseph Jr.J. On January 24, 1984 the said respondents applied by summons to have the said Court Order set aside, and on May 25, 1984 the said interlocutory injunction was duly discharged by Mustapha bin Hussain J. The appellant was dissatisfied with the decision of the learned Judge and filed notice of appeal to the Federal Court.

Giving his grounds of judgment for setting aside the interlocutory injunction of January 11, 1984 the learned Judge said:

"Accordingly, I find after careful perusal of the affidavits that the plaintiff had failed to disclose the following material facts, namely:

- (i) that at the time of the *ex parte* application for an order of injunction the plaintiff did not disclose that his ground tenancy of the vegetable plot had been terminated by a letter of termination dated July 12, 1976 which this Court holds to have been validly terminated;
- (ii) that at the time of the *ex parte* application for an order of injunction the plaintiff did not disclose to the Court that there was then and remains existing to-date an order of injunction dated December 10, 1982 against the representatives of the Persatuan Penduduk-Penduduk Kawasan Thean Teik dan Kampong Pisang, Ayer Itam, Pulau Pinang of which the plaintiff is one of its office-bearers. I view this non-disclosure most

A material and vital as it is now some fourteen months since this Court confirmed on December 10, 1982 the *ex parte* injunction of January 14, 1982 subject to variation to cover the immediate areas of development only, a decision which has not been appealed against. This Court would not have granted an injunction which in effect conflicts with the order of Court dated December 10, 1982 — a very ridiculous state of affairs of an injunction diametrically opposing another injunction.

B I have considered the affidavits and the submissions of the counsel very carefully but find that the plaintiff has not only suppressed very material facts but has deliberately misled the Court when he applied for an *ex parte* interim injunction. On this ground alone it would suffice to allow the defendants' application and to set aside the *ex parte* interim injunction. This Court has in its discretion allowed costs to be costs in the cause considering the somewhat sad circumstances of the case."

C As regards ground (i) learned counsel for the D appellant had submitted that in para. 11 of the appellant's affidavit, affirmed on January 10, 1984 filed in support of his *ex parte* application for an interlocutory injunction, it was stated that —

E "By a letter dated July 12, 1976 the first defendant purported to terminate the tenancy of my vegetable plot on September 30, 1976 on the alleged ground, which is totally untrue, I had infringed the Estate Building Regulations. The said letter is invalid and ineffective to determine my tenancy which is coupled with an equitable interest in the said plot. A copy of the said letter is now produced and shown to me marked as exhibit P4 and a photocopy thereof is annexed hereto."

F In view of the contents of this paragraph learned counsel for the respondents had to concede, rightly so in our opinion, that the learned Judge was wrong in his conclusion.

G When the learned Judge ruled that the ground tenancy of the vegetable plot "which this Court holds to have been validly terminated" he seems to have in mind his judgment in the case of *Cheng Hay Gun & Ors. v. Perumahan Farlim (Penang) Sdn. Bhd.*⁽¹⁾ where it was held that the definition of "premises" in the Control of Rent Act 1966 does not appear to include "vegetable lands" and therefore does not attract protection under the Act (see Penang High Court C.S. Nos. 311, 313 and 317 of 1982). Since *Cheng Hay Gun's* case (*supra*) does not appear to be a Representative Action the judgment is, with respect, not binding on the appellant and the learned Judge ought to have disregarded it, for the purpose of considering whether or not the interlocutory injunction dated January 11, 1984 ought to be discharged.

I Next, learned counsel for the appellant contended that the learned Judge was also wrong with

regard to ground (ii) inasmuch as the *ex parte* 1982 interlocutory injunction obtained by the 3rd respondent, Sriwata Sdn. Bhd. on January 11, 1982 and varied by the learned Judge on December 11, 1982 had been fully disclosed and exhibited in paras. 19 and 28 of the affidavit of the appellant dated January 10, 1984. Para. 19 reads:

"On January 14, 1982 in Civil Suit No. 22 of 1982 the third defendant, by representing to this Honourable Court that the earthworks undertaken by them would not affect the property of the tenants, obtained *ex parte* an interlocutory injunction against the office-bearers of the Persatuan Penduduk-Penduduk Kawasan Thean Teik at Kampong Pisang, Ayer Itam, Penang restraining them from, *inter alia*, interfering with the third defendant's development of the said land. A copy of the said injunction is now produced and shown to me marked as exhibit P9 and a photocopy thereof is annexed hereto."

And para. 28 reads:

"On December 11, 1982 His Lordship Mr. Justice Mustapha bin Hussain made an order varying the interlocutory injunction granted by him on January 14, 1982 by limiting the operation to three areas of the said land, which includes the plot on which my home and far are situated. I have filed an application to set aside this injunction. The said Order is now produced and shown to me marked as exhibit P15 and a photocopy thereof is annexed thereto."

Having read the contents of paragraphs 19 and 28 of the appellant's affidavit dated January 10, 1984 we are unable to agree with the learned Judge that there was a non-disclosure of an interlocutory injunction granted by him on January 14, 1982 which was subsequently varied and confirmed on December 10, 1982 as stated in ground (ii) of his judgment, when both the Court Orders have been properly exhibited and attached to the supporting affidavit.

In a supplementary ground the learned Judge appeared to allude to the fact that the appellant had deliberately misled the Court when he applied, *ex parte*, for an interlocutory injunction before Edgar Joseph Jr. J. in January 1984. The learned Judge did not state the facts which resulted in the Court being led astray. However, learned counsel for the respondents pointed out that by asserting in para. 28 of the appellant's affidavit that, *inter alia*, "I have filed an application to set aside this injunction", the appellant had deliberately misled the Court in thinking that he had lodged an appeal to the Federal Court to set aside or vary the injunction when in actual fact the appeal was withdrawn after notice of appeal had been filed. This interlocutory injunction relates to Penang High Court C.S. No. 22/82 against Persatuan Penduduk-Penduduk Kawasan Thean Teik dan

A Kampong Pisang, Ayer Itam, Penang and the appellant herein is one of the two vice-presidents of the association. Being a representative action it was submitted that the Court Order would be binding on the appellant.

B For the appellant it was contended that C.S. No. 22/82 is not a representative suit and the appellant is not bound by the interlocutory injunction. In this appeal we have not been asked to resolve the question whether or not C.S. No. 22/82 is a representative suit. We are only concerned to determine the complaint made by the learned Judge that in his *ex parte* application for an interlocutory injunction in January 1984 before Edgar Joseph Jr. J. the appellant had deliberately misled the Court. In our judgment, not only paragraphs 19 and 28 but the whole affidavit should be read. So read, we are unable to agree with the learned Judge or the submission of learned counsel for the respondents that this single sentence in para. 28 amounted to or could amount to an attempt by the appellant to mislead the Court deliberately.

E In *Hadmor Productions v. Hamilton*⁽²⁾ Lord Diplock said:

"An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court Judge by whom application for it is heard. Upon an appeal from the Judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the Judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only ..."

G This general statement of principle of the primary function of an appellate court in hearing an appeal against the refusal or granting or setting aside of an interlocutory injunction by a Judge of the High Court by Lord Diplock was adopted by Salleh Abas F.J. (as he then was) in the case of *Lian Keow Sdn. Bhd. v. Overseas Credit Finance Bhd.*⁽³⁾

I Applying this here and on a review of the facts of the case, we are satisfied that the learned Judge, Mustapha Hussain J., had misapprehended the facts which led him to come to a conclusion contrary to the affidavit evidence lodged by the appellant in support of his application for an *ex parte* interlocutory injunction against all the three respondents. Since there was no cross-appeal by the respondents that the Court had exercised its discretion on wrong principle in granting the interlo-

cutory injunction on January 11, 1984 we have to allow this appeal with costs here and below. We therefore set aside the Court Order dated May 25, 1984 and restore the interlocutory injunction dated January 11, 1984 until the disposal of Penang High Court C.S. No. 17 of 1984. We also order an early trial of this action in October 1984 before another Judge. Deposit of \$500/- to be refunded to the appellant.

Order accordingly.

Solicitors: *Syarikat Mohideen Abdul Kader, Shearn Delamore & Co.*

**Q.B.E. SUPREME INSURANCE BHD. & ORS.
v. SYARIKAT CHEMAS PEMBORONG SDN.
BHD. & ORS.**

[O.C.J. (Abu Mansor J.) November 12, 1984]

[Kota Kinabalu – Civil Suit No. K486 of 1983]

Practice and Procedure – Order 14 application – Guarantee and indemnity – Defence not bona fide – Conditional leave to defend – Denial of signing by 2nd & 3rd defendants – R.H.C 1980, O.14 & O.38 r.2(3).

In this application, the plaintiffs applied for final judgment under O.14 against the 2nd and 3rd defendants for a stated sum of money in connection with the guarantee and indemnity given by them to the plaintiffs. In the course of the proceedings counsel for the plaintiffs asked only for order for conditional leave to defend to be given to the 2nd and 3rd defendants. He submitted that there was reasonable doubt in the 2nd and 3rd defendants' defences and they therefore ceased to be *bona fide*. The 2nd defendant denied signing the said letter of indemnity (in his personal capacity) and the 3rd defendant also denied signing it.

Held: (1) before the learned judge ordered the 2nd and 3rd defendants be given conditional leave to defend, he must be satisfied that there was no real substantial question to be tried or that there is no dispute as to facts of law which raises a reasonable doubt that the plaintiffs are entitled to judgment;

(2) the learned judge made a finding that the 2nd defendant did in fact sign the indemnity in his personal capacity as well and he therefore doubted the *bona fide* of the 2nd defendant's defence;

(3) the 2nd defendant was given leave to defend on condition that he deposit the stated sum claimed within one month failing which the plaintiffs were to have liberty to sign final judgment. The 3rd defendant was given unconditional leave to defend;

(4) costs of the plaintiffs for the application to be taxed in respect of the 2nd defendant. No order as to costs in respect of the 3rd defendant.

A Cases referred to:

- (1) *Chong Chow Fong v. Ban Tuck (Malaysia) Sdn. Bhd.* [1983] 2 C.L.J. 25.
- (2) *Fieldrank Ltd. v. Stein* [1961] 3 All E.R. 681.
- (3) *Cho Chin Huat v. Lee Boo Hock* [1970] 1 M.L.J. 112.
- (4) *Foong Weng Tat v. Vu Siew Chin* [1974] 2 M.L.J. 20.
- (5) *Jacobs v. Booths Distillery Co.* [1901] 85 L.T. 62.

B

SUMMONS-IN-CHAMBERS.

C

C. I. Robertson for the plaintiffs.
Miss Chong Poh Shan for 2nd & 3rd defendants.

Cur. Adv. Vult.

D Abu Mansor J.: On April 18, 1984, the plaintiffs herein took out a summons under Order 14, Rules of the High Court, praying for final judgment in this action against the 2nd and 3rd defendants for the amount claimed in the Statement of Claim with interest and costs to be taxed. In support of this application, the plaintiffs' manager, **E** Cheng Kam Meng, swore an affidavit dated January 25, 1984, setting out the details of the plaintiffs' claim wherein at Paragraph 3 of the said affidavit he summarised:

"The 2nd defendant, Chu Yun and the 3rd defendant, Yip My Chua (f), jointly and severally with the First, **F** Fourth, Fifth and Sixth Defendants, are and were at the commencement of this action justly and truly indebted to the abovenamed Plaintiffs in the sum of \$120,260.35 in connection with their (the Defendants') guarantee and indemnity given to the Plaintiffs consequent upon the Plaintiffs issuing a counter indemnity in favour of their (the Plaintiffs') bankers, the Bumiputra Merchant Bankers **G** Berhad, in consideration of which Bumiputra Merchant Bankers in turn issued the banker's guarantee of \$120,260.35 in favour of the Sabah Ports Authority."

In opposition, the 2nd and the 3rd defendants put in their affidavits dated June 16, 1984 and **H** August 7, 1984, respectively. In paragraph 19 of 2nd defendant's affidavit, among other defences, he denied signing the said letter of indemnity (in his personal capacity) and in paragraphs 6 and 7 of the 3rd defendant's affidavit she also denied signing the letter of indemnity and therefore denies **I** liability to the plaintiffs in the said sum.

At the hearing of the Order 14 Summons on November 5, 1984, Mr. C.I. Robertson for the plaintiffs, pursuant to an earlier notice, made an application to cross-examine the 2nd and the 3rd defendants on their respective affidavits citing